FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Nos. 296 and 297.

Office Supreme Court U. S.
FILED
APR 21 1903
JAMES H. McKENNEY,
Clerk.

ALBERT HUEGIN,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

ANDREW J. AIKEN,

Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

JAMES G. FLANDERS, of Counsel,

For Defendant in Error, The State of Wisconsin.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

Nos. 298 and 297.

ALBERT HUEGIN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

ANDREW J. AIKEN,
Plaintiff in Error,

vs.

THE STATE OF WISCONSIN,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

May it Please the Court:

The statute, the validity of which is called in question on these writs of error, is Sec. 4466a Wisconsin Statutes, 1898, as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the pur- "pose of wilfully or maliciously injuring another in his reputa- "tion, trade, business or profession by any means whatever, or "for the purpose of maliciously compelling another to do or "perform any act against his will, or preventing or hindering "another from doing or performing any lawful act, shall be "punished by imprisonment in the county jail not more than "one year or by fine not exceeding five hundred dollars."

I.

This statute was construed by the Supreme Court of the state on habeas corpus proceedings based on the alleged insufficiency of the preliminary compliant on which plaintiffs in error were arrested.

State ex rel. Durner vs. Huegin et al., 110 Wis. 189. (Rec. 6).

The complaint there in question, it will be seen, was framed under the statute and charged plaintiffs with the offense by the statute denounced, setting forth specifically the combination, agreement and acts in pursuance thereof which it was alleged constituted the offense. The Court was called upon expressly to determine and construe the scope and meaning of the statute to determine whether the specific combination and acts charged in the complaint came within its purview, and in the course of the determination of that question the general scope and meaning of the statute with reference to the character of combinations against which it was directed were definitely determined.

The conclusion of the court thus announced as to the meaning and construction of the statute in this regard was as follows:

"Our conclusion is this: The term 'malicious injury' as "used in the stattute is synonomous with that term at the "common law. It refers to the infliction of a wrongful injury "intentionally. Such a wrong is actionable even though the "same purpose, if formed and executed by an individual, "would not in contemplation of law be considered sufficiently "serious to call successfully for legal redress. There is noth- "ing in this militating at all against the right of individuals "to combine and associate together for the purpose of pro- "moting their individual welfare in any legitimate way. It "strikes only at the assertion of a right of combining to re- "sort to the use, as a single power, of the individual abilities "and resources of two or more to wrongfully accomplish "harm to another in the line of those things mentioned in the "statute. It is in harmony with the doctrine, so definitely "stated by Baron Brammel in Reg. vs. Druitt, 10 Cox, Cr. Cas.

"593, that it has often been quoted by courts and text-writers "and nowhere rejected: 'The liberty of a man's mind and "will to say how he shall bestow himself and his means, his "talents and his industry, is as much a subject of the law's "protection as that of his body;' and 'if any set of men agree "among themselves to coerce that liberty of mind and "thought by compulsion and restraint, they are guilty of a "criminal offense.'"

Ib., pages 262, 263,

and it was held that the complaint sufficiently alleged a violation of the statute *thus construed.*

This complaint, as will appear, was merely the complaint on which the warrants were issued and the plaintiffs apprehended. The information which followed and on which they were tried and convicted, was in all material respects the same as the complaint under which the statute was thus construed. (See information, Rec. 16; also complaint, 110 Wis., 193.)

As will be seen from the record (page 7) the judgment here complained of did not give any broader or different construction to the statute from that formerly announced on the question of the sufficiency of the preliminary complaint. On the contrary, it was expressly based upon the understanding of the court that the defendants had in effect confessed the charges contained in the information and pleaded guilty to a violation of the statute as formerly construed, and that such former decision was therefore in all respects *res judicata* upon all the questions involved.

This, as set forth in the record herein, is so pointedly and explicitly stated by the Court as the grounds of the judgment complained of that for the convenience of this Court we venture to quote from the opinion and the grounds thereof as follows:

(After a statement of the preliminary facts.)

"The plaintiffs in error thereupon each in his own behalf "refused to plead over to the information, admitted all the "allegations thereof, but insisted that the acts charged do "not constitute punishable offense. Thereupon the plaintiffs

"in error were severally adjudged guilty as charged in the "information, and punishment therefor was duly imposed by "the judgment of the Court. * * *

"From the foregoing statement it appears that all the "questions raised in the Court below by plaintiffs in error "were considered and decided against them in State vs. "Aikens, State vs. Huegin, and State vs. Hoyt, 110 Wis., 189. "The trial Court followed that decision as it was bound to do. "As we understand the matter the information contains the "same charge as the one set forth in the complaint, the plain-"tiffs in error in effect pleaded guilty thereto, admitting the "doing of all the acts charged against them, and they were "thereupon duly adjudged guilty and sentenced. In that "view the judgments must be affirmed, as all questions in "regard to the matters are *res adjudicata* as before indicated." (Rec. 6, 7.)

As will be seen from the information (Rec. 16) and the complaint before referred to, it was expressly charged that the combination and agreement were entered into and the specified acts pursuant thereto done for the purpose and with the intent of *willfully and maliciously* injuring The Journal Company and the other parties named, in their trade, business and occupation.

It had been held by the Supreme Court of the State in the decision first referred to, that the natural result of the agreement and combination if carried into execution would so obviously be to injure The Journal Company, and that the possible benefits of the combination to the parties thereto were apparently so remote, that in view of the rule that persons are presumed to intend the natural and probable consequences of their acts, it could not reasonably be said that the combination was formed for any other purpose than for the purpose of wilfully and maliciously injuring The Journal Company, using the word "maliciously" in the sense of the term at common law.

State ex rel Durner vs. Huegin, supra, at pages 249, 251.

It seems to be contended here by plaintiffs in error that the allegations of their pleas "that those acts, intentions, agreements and combinations were done or made and entered into in *trade competition*, and that such acts, intentions, agree-

nents and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," properly construed were sufficient in law to negative the charge of malice contained in the information, and which the state Supreme Court had held as before stated was a necessary ingredient of the offense under the statute.' The Court, however, did not so understand or construe the allegations quoted, but evidently took the view that it being previously admitted in effect that the combination was formed for the purpose of maliciously injuring The Journal Company the allegations to the effect that the motive for such injury was inspired by trade competition or business rivalry was not a sufficient excuse. In this, it is submitted, the Court was right. It might be very advantageous from a business point of view, for example, for a business competitor to burn his rival's place of business or even to slay such rival, but it would scarcely be admitted as a defense in such a case that there was no personal feeling in the matter, but that the act was done merely to gain a business advantage. These are extreme illustrations but they serve to show that if there be no other legal justification or excuse for an act, the mere fact that it may have been done "in trade competition" does not make it lawful. But if it be conceded for the sake of argument that the state Court was wrong in that it may have not have given proper effect to the averments of the pleas of the plaintiffs in error which were intended to be a justification or excuse for their admitted acts and conduct, this obviously would not have the effect of extending the meaning or construction of the statute to cover combinations in which there was no element of malice or wrongful intent to injure, but would at most merely amount to an error of the Court, in construing the allegations of the pleas.

The statute, therefore, stands as construed by the decision in *State ex rel Durner vs. Huegin*, supra, which construction under the settled rules of this Court is conclusive here.

So construed the statute is merely declaratory of the common law.

Hawkins' Pleas of the Crown, Ch. 27, Sec. 2;
Rex vs. Eccles, 1 Leach, 274;
Chitty Cr. Law, 1139;
Archibold Criminal Practice and Pleading, 1829;
Queen vs. Kendrick, 5 Q. B. D., 49.

Authorities in this country to the same effect might be multiplied indefinitely. For example, see

Crump vs. Commonwealth, 84 Va., 927;
State vs. Stewart, 59 Vt., 273;
State vs. Donnelson, 32 N. J. L., 151, 156;
State vs. Glidden, 55 Conn., 46;
People vs. Petheram, 64 Mich., 252;
State vs. Burnham, 15 N. H., 403;
Commonwealth vs. Carlisle, Brightly, 36.

The language of Mr. Chief Justice Gibson in the case last cited is so pertinent that we venture to quote it:

"A combination is criminal when the act to be done has a "necessary tendency to prejudice the public or to oppress in- "dividuals by unjustly subjecting them to the power of the "confederates. It will therefore be perceived that the motive "for combining, or what is the same thing, the nature of the "object to be attained as a consequence of the lawful act, is "in this class of cases the discriminating circumstance. "Where the act is lawful for an individual it can be the sub- "ject of a conspiracy when done in concert only where there "is a direct intention that injury shall result from it, or where "the object is to benefit the conspirators to the prejudice of "the public or the oppression of individuals, and where such "prejudice or oppression is the natural and necessary con- "sequence."

Even a cursory review of the adjudicated cases is sufficient to demonstrate that the general definition of conspiracy at common law frequently found in the books, to-wit: that it is a combination of persons to do an act unlawful in itself, or an act not in itself unlawful by unlawful means, is not strictly accurate or sufficiently comprehensive to cover all cases.

Take, for illustration, a combination to do an act highly immoral or against recognized rules of public policy. Here the act in itself may not be unlawful, nor need the means by which it is to be accomplished be in themselves unlawful; yet it is thoroughly established that such a combination was illegal and indictable at the common law.

(See the exhaustive review of the law of criminal conspiracy in State vs. Buchanan, 5 Harris & Johnson, 317.)

In *Farmers' Loan & Trust Company vs. Northern Pacific R. R. Co.*, 60 Fed Rep., 803, at page 817, it was said, referring to the statute in question and other cognate provisions:

"These statutes are declaratory of the common law and "wholly condemn all conspiracies to injure or oppress or to "interfere with the rights of others."

In Arthur vs. Oakes, 63 Fed. Rep. 310, decided by the Court of Appeals for the 7th Circuit, Mr. Justice Harlan in the course of an exhaustive discussion and review of the rules and principles of the common law governing the offense of conspiracy, said:

"The principle that a combination or conspiracy of two "or more persons to injure the rights of others is illegal, al- "though nothing may have been done in execution of that in- "tent, has been embodied in the Statutes of Wisconsin, in "which state the present cause is pending,"

citing and quoting the statute here in question. *Ib. page 325.*

It would savor of supererogation to multiply authorities to the effect that the statute as construed by the ultimate tribunal of the state is merely declaratory of the common law, and in that view it is, of course, unnecessary to argue that the statute is not unconstitutional. No provision of the state or federal constitution has been referred to which gives to any individual or combination of individuals the right to commit acts which were recognized as crimes at the common law.

II.

It was not necessary, even at common law, to make a combination formed for the purpose of injuring the business of another illegal that such purpose should be the sole or

ultimate object of the combination. It was sufficient if there were a direct and immediate purpose to injure others, even though the ultimate object were to benefit the parties to the combination:

People vs. Petheram, 64 Mich., 252, 261, 262;
Arthur vs. Oakes, 63 Fed., 310;
Hopkins vs. Oakley Stave Co., 83 Fed. Rep., 912;
Temperton vs. Russell (1893), 1 Q. B. Div., 715;
Steamship Co. vs. McGregor, 23 Q. B. Div., 715;
Quinn vs. Leathem (*House of Lords*, *1901*), Law Rep. App. Cas., 495.

"A combination for the purpose of injuring another is a combination directed personally against the party to be injured, and the law allowing parties to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their purpose the immediate hurt of another:"

Greenhood on Public Policy, 651.

From the authorities, it would seem that the lawfulness or unlawfulness of a combination, the result of which was or might be to injure the business of others, turned at the common law upon the question of the intent with which the combination was formed; the question of the primary or immediate purpose—whether the injury to others was incidental, indirect and consequential, or was the immediate and direct purpose of the combination, notwithstanding the ultimate object might be advantage to the parties to the combination

It would be a hopeless task, as well as a useless one, to undertake to review the almost innumerable cases on the subject; but it is submitted that practically all the cases can be reconciled on the ground immediately above suggested. As examples of the many cases that might be cited illustrating the doctrine of the common law on the subject, we submit the following:

Arthur vs. Oakes (*C. C. A.*), 63 Fed., 323, *supra;*
Doremus vs. Hennesy, 176 Ill., 608;

Barr vs. Trades Councils (*N. J. Chan.*), 30 Atl Rep., 881;
Hilton vs. Eckersley, 6 El. & Bl., 47, 74;
Steamship Co, vs. McKenna, 30 Fed., 48;
Casey vs. Typographical Union, 45 Fed., 138;
Callan vs. Wilson, 127 U. S., 547;
Mogul S. S. Co. vs. McGregor, 23 Q. B. Div., 598; A. C., 25;
Continental Ins. Co. vs. Board of Underwriters, 67 Fed., 319;
Temperton vs. Russell, 1 Q. B. Div., 715;
Walker vs. Cronyn, 107 Mass., 555;
Graham vs. St. Charles St. Ry. Co., 27 R. L. A., 416;
Hopkins vs. Oakley Stave Co., 83 Fed., 918;
Quinn vs. Leathem, Law Rep. App. Cas. (1901), 515. overruling *Allen vs. Flood*, *H. L. Appeal Cases* (1898), 1.

We think it may be said that the authorities conclusively establish the following propositions:

1. The *civil action of conspiracy* at common law was a substantive right of action, and did not necessarily depend upon any wrong or violation of legal right independent of the combination feature.

(a) The fact of the combination and the element of malice might give a right of action where, without the conjunction of the combination and malice, no action would lie.

(b) In order, however, to give rise to a right of civil action, actual damage must have resulted.

2. The *crime of conspiracy* at common law was a substantive offense, not necessarily dependent upon the inherent criminality or unlawfulness of the thing to be done or of the measures by which it was to be accomplished.

(a) It had its foundation in public policy and in the peace and welfare of society, and had no necessary connection with any question of civil damages or pecuniary loss to particular individuals.

It is obvious from the authorities that the rule which ordinarily prevails in civil actions, that the motive or

intent with which an act is done is not an element of the cause of action, is not generally applicable to civil actions of conspiracy, and is not applicable at all to conspiracy in its criminal aspects any more than to any other criminal offense. Likewise, the general rule that what may be lawfully done by one may with equal propriety be done by many is manifestly not applicable to the case of conspiracy.

As illustrating the distinction between the civil action and the criminal offense, and the principles on which each rests, see

6 Amer. & Eng. Enc. (New Ed.), 872.
Bishop on Non-Contract Law, Sec. 592;
Clifford vs. Brandon, 2 Campbell. 358;
Boutwell vs. Marr, 71 Vt., 6.

III.

Even were it conceded that the intent of the statute was to enlarge the scope of the protection afforded by the common law to the freedom of trade and competition so as to comprehend within its purview all combinations whether formed for the direct purpose of injuring the business of another, or for the purpose of benefiting the parties to the combination by wilfully injuring the business of others, it would still be clearly within the limits of legislative authority.

The state has a direct interest in the encouragement and protection of individual enterprise, and to that end, independently of the question of motive or intent, it may make all reasonable regulations to protect the individual from the unequal power of combinations. The basis of this interest is public policy—the basis of authority for all police regulations. *U. S. vs. Trans-Missouri Freight Association, 166 U. S. 290.* In the interest of public policy the legislature may authorize a monopoly: *Slaughter-House Cases*, 16 Wall. 36. Conversely, it may prohibit monopolies, a power very frequently exercised. Between these two extremes its power is plenary to regulate or restrict the power of combinations to hamper or destroy individual enterprise, individual effort. To promote

and protect the healthy and orderly growth of business, of the industrial and commercial interests of the state is one of the chief purposes of government. It is separate action that begets competition; competition that promotes progress. To protect the individual against the combined strength of the multitude is not only a right but the duty of the state. The right to earn a living, to carry on his business free from malicious interference, free from the unequal power of combinations f rmed to harass, oppress and destroy is one of the recognized rights of the individual member of a civilized society. To secure this right, to secure the peace, prosperity and happiness of the people, to secure its own existence the state must have the power to say that combinations formed to control or restrict trade; combinations to injure, destroy, molest or disturb the right of the individual to carry on his business in his own way, are illegal.

The ground on which the constitutionality of the present statute is challenged seems to be that it is an undue restriction of the right of individuals to combine for the purpose of using their joint efforts to promote their own business welfare. The question in the aspects in which it is presented seems so entirely free from novelty, that any extended discussion thereof on our part could hardly be profitable. The subject is fully covered by recent cases in this court, such for example as *U. S. vs. Trans-Missouri Freight Association, Supra.*

We call the attention of the court to a few of the many cases that might be cited illustrative of the limitations upon the scope of the federal constitution to abridge the powers of the state to regulate its internal affairs affecting the peace, order and general welfare of the community:

Allgeyer vs. Louisiana, 165 U. S., 589;
Munn vs. Illinois, 94 U. S., 113, 124;
Slaughter-House Cases, 16 Wall., 62;
Barbier vs. Conway, 113 U. S., 31;
Soon Hing vs. Crowley, 113 U. S., 709.

As said by Mr. Justice Miller in the Slaughter-House Cases *supra*, at page 62: "This police power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comforts of an existence in a thickly populated community, the enjoyment of private and social life and the beneficial use of property. It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state, and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this, no question ever was, or upon acknowledged general principles ever can be, made."

Also Mr. Justice Field in *Barbier vs. Conway, 113 U. S.*, at page 31:

"But neither the amendment" (the 14th),—"broad and comprehensive as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity."

Under this power the legislature of the state of Wisconsin has provided "that every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal": *General Statutes of Wis., 1898, Sec. 1747c.*

The same statute further provides: "Every person who shall combine or conspire with any other person to monopolize, or attempt to monopolize any part of the trade or commerce in this state" (Wisconsin) "shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state" (Wiscon-

sin) "for all damages he may sustain by reason of the doing of anything forbidden by this section."

The foregoing statute was passed in 1893 and was copied substantially from the act of Congress on the same subject known as the Sherman act, the validity of which has been sustained by this Court.

Similar statutes to the one here called in question have been in force in other states for many years and their constitutionality has been uniformly upheld or assumed without question.

Section 168 of the Penal Code of the state of New York makes it a misdemeanor for two or more persons to conspire to do an act injurious to the public health, public morals, or to trade or commerce, etc. That statute, it will be seen, is much broader in its terms than the statute here under consideration. It was construed by the highest Court of the state of New York in a very extreme case, and its constitutionality was not questioned:

People vs. Sheldon, 139 N. Y., 251; 34 N. E. Rep., 785.

Later its validity was attacked and expressly upheld in *Matter of Davies, 168 N. Y., 89, 101.*

In Illinois it is made a criminal offense "for two or more persons to wilfully and maliciously combine or conspire together to obstruct or impede, by any act or by means of intimidation, the regular operation and conduct of the business of any railroad company or any other corporation, firm or individual in the state.":

Rev. Stats. of Ill., Sec. 130.

In Indiana it is made a crime to coerce an employe by making non-membership in any labor organization a condition of employment:

Burns' Stats., Sec. 2302.

In Iowa, by Section 5059 of the General Statutes of that state, it is made a crime to conspire "wrongfully to injure the person, character, business, property or rights in property of another, or to do any illegal act injurious to the public trade, etc".

In Minnesota (Stats. of 1894, Sec. 6423) it is made a crime to combine to prevent a person from procuring employment by threats, promises or the circulation of black-lists, or to procure the discharge of an employe.

In New Hampshire, by the Public Statutes of 1891, (Ch. 266, Sec. 12) it is made a crime "to interfere in any way whatever to *injure or damage* another in his person or property while engaged in his lawful business, trade or occupation, or while on the way to or from the same; or to endeavor to prevent any person from engaging in his lawful business, trade or calling."

In Rhode Island, by the General Laws of 1896 (Ch. 279, Sec. 45), it is a crime "to wilfully and maliciously or mischievously * * * obstruct another in the prosecution of his lawful business or pursuits, in any manner."

It will be seen that these various statutes, while differing somewhat in their terms and scope, are all directed to substantially the same end, to-wit: the encouragment of industry, by the prevention of malicious interference therewith, and the prohibition of combinations organized and intended for the purpose of hampering, hindering or destroying individual enterprise in legitimate trade and commerce. The fact that such statutes so generally prevail in the various states is strong evidence, not only of the necessity for such restraints, but of the general policy of legislation on the subject and the understanding of the Courts that such statutes are not without the legislative power.

Respectfully,

LA FAYETTE M. STURDEVANT,

Attorney General of Wisconsin.

JAMES G. FLANDERS, of Counsel,

For Defendant in Error, The State of Wisconsin.